

Letter of Findings: 09-0900
Sales and Use Tax
For the Tax Years 2000-2007

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ISSUES

I. Sales and Use Tax—Refund Denials.

Authority: IC § 6-2.5-3-5; IC § 6-2.5-5-3; IC § 6-2.5-5-6; IC § 6-2.5-1-5; IC § 6-8.1-5-1; IC § 6-8.1-9-1; [45 IAC 2.2-5-14](#); 28 Ind. Reg. 3585 (Sept. 1, 2005); North Cent. Industries, Inc., Co. v. Indiana Dep't of State Revenue, 790 N.E.2d 198 (Ind. Tax Ct. 2003); Miles, Inc. v. Indiana Dep't of State Revenue, 659 N.E. 2d 1158 (Ind. Tax Ct. 1995); USAIR, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993).

Taxpayer argues that the Department erred in denying the sales and use tax refunds it claimed for the 2000 to 2007 tax years.

II. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-5; IC § 6-2.5-3-7; IC § 6-2.5-4-1; IC § 6-2.5-5-8; IC § 6-2.5-5-9; IC § 6-8.1-5-1; [45 IAC 2.2-1-1](#); [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-1](#); [45 IAC 2.2-5-15](#); [45 IAC 2.2-5-16](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); North Cent. Industries, Inc., Co. v. Indiana Dep't of State Revenue, 790 N.E.2d 198 (Ind. Tax Ct. 2003); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988).

Taxpayer protests the imposition of use tax on certain of its purchases.

STATEMENT OF FACTS

Taxpayer is a retailer of consumer products in Indiana and other states. Taxpayer submitted to the Department of Revenue (Department) a request for refund for sales and use taxes it paid for the tax periods from January 1, 2000, through December 31, 2007. The Department of Revenue (Department) conducted an audit review of Taxpayer's business records. As a result of the audit, the Department denied Taxpayer's refund claim and determined that Taxpayer owed additional use tax for the 2006 and 2007 tax years. Taxpayer protested certain of the purchases for which the refunds were denied and certain of the purchases on which use tax was assessed. An administrative hearing was held, and this Letter of Findings results.

I. Sales and Use Tax—Refund Denials.

DISCUSSION

The Department denied Taxpayer's sales and use tax refund claims for the 2000 to 2003 tax years because the claims were barred by the statute of limitations and were disallowed by a settlement agreement that was entered into during amnesty. The Department denied Taxpayer's refund claims for the 2004 to 2007 tax years because several of the claimed items were determined not to be exempt from tax and several additional items were found that were subject to tax offsetting the refund claim. Taxpayer maintains that the claims for the 2000 to 2003 tax years were timely, that the claims for the 2004 to 2007 tax years contain claims for the sales tax paid on "mail labeling equipment, supplies, and materials" and "COMBO and SIBO form invoices" that qualify for "manufacturing exemptions," and that it is entitled to a refund for these amounts.

A. Timeliness of the 2000 to 2003 Tax Years Claim.

Taxpayer protests the denial of its refunds claimed for the 2000 to 2003 tax years. Taxpayer agrees that its refund claim would be untimely but for its November 11, 2005, payment. IC § 6-8.1-9-1(a) provides that for a refund claim to be timely it must be made within three years of the later of the return's due date or the date of the payment(s). Taxpayer maintains that the refund filings were timely as to its November 11, 2005, payment of \$280,000, as part of a settlement agreement. Taxpayer argues that its right to claim the refund on this payment was not given up as part of the settlement agreement.

On September 9, 2005, Taxpayer submitted a signed amnesty application for the payment of \$280,000, which stated "I accept the terms of the Indiana Tax Amnesty Program. I understand that by signing this agreement, **I give up my right to protest, appeal, or file a claim for refund or credit of those amounts for which I have selected amnesty.**" (Emphasis added.) On September 11, 2005, Taxpayer and the Department signed a Settlement Agreement stating that "interest... and... penalty... are to be waived by **the Department in conjunction with the state's current amnesty program. (Taxpayer application attached).**" (Emphasis added.) Taxpayer's September 9, 2005, amnesty application for the payment of \$280,000, was the enclosure that was incorporated as part of the September 11, 2005, Settlement Agreement.

Section 19 of the Amnesty Regulation provides as follows: "**A prerequisite to participation in the amnesty program requires the taxpayer to:** (1) pay the full amount of a tax liability for a tax period; (2) relinquish all rights to protest a tax liability that is being paid; and (3) **agree not to file a claim for refund of the tax paid.**" 28 Ind.

Reg. 3585 § 19 (Sept. 1, 2005). (**Emphasis added.**)

Accordingly, while Taxpayer's claim for refund was filed with three years of its November 11, 2005, \$289,000 payment, Taxpayer has given up its rights to file a claim for refund on this \$280,000 payment. Therefore, the Department correctly denied Taxpayer's refund claim for the 2000 to 2003 tax years.

B. 2004 to 2007 Tax Years: Manufacturing Exemptions.

Taxpayer protests the denial of its sales and use tax refunds claimed for the 2004 to 2007 tax years. Taxpayer maintains that it is entitled to a refund for the sales and/or use tax it paid on "mail label bar coding equipment, supplies, and materials" and "COMBO and SIBO form invoices" because the purchases qualify for "manufacturing exemptions."

1. Mail Label Bar Coding Equipment, Supplies, and Materials.

Taxpayer's "mail label bar coding equipment" creates bar coded labels that are used by the United States Postal Service's and the United Parcel Service's mailing systems. Taxpayer's customers chose which delivery system it would like to use to receive Taxpayer's merchandise. When the United States Postal Service or the United Parcel Service is chosen, Taxpayer creates a bar coded label for the delivery of the item(s). Based upon which delivery system the customer chooses, Taxpayer's customers' invoices include a "shipping" charge upon which Taxpayer collects sales tax. See IC § 6-2.5-1-5(a)(4) (providing that gross retail income is money received in a retail transaction without any deduction for delivery charges and that "delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing).

Taxpayer maintains that these "bar coded mail labels" are "incorporated" into the product that it sells and are exempt under the "manufacturing incorporation exemption" found in IC § 6-2.5-5-6. Taxpayer further asserts that since the "bar coded mail labels" are incorporated into the product, the equipment, supplies, and materials used to produce the labels are exempt under the "manufacturing equipment exemption" found in IC § 6-2.5-5-3.

Notwithstanding that Taxpayer's labels would not qualify for the "incorporation exemption" as the labels are not "incorporated" as a "material part" of the product as required by IC § 6-2.5-5-6 and [45 IAC 2.2-5-14](#), Taxpayer is not entitled to the "manufacturing exemptions." Taxpayer's purchases would not qualify for either of the manufacturing exemptions found at IC § 6-2.5-5-6 or IC § 6-2.5-5-3 because Taxpayer is not a manufacturer of goods for sale. Taxpayer is a retailer—i.e., it buys large quantities of packaged goods that are produced by someone else, repackages the products for sales to consumers, and ships them to the consumers. Thus, Taxpayer merely repackages the goods that are manufactured by others. The Tax Court addressed the issue of repacking in *North Cent. Industries, Inc., Co. v. Indiana Dep't of State Revenue*, 790 N.E.2d 198 (Ind. Tax Ct. 2003), where the taxpayer bought fireworks in bulk and sold packages containing a variety of fireworks. In that case, the court explained:

North Central does not create a new, marketable product; it merely packages existing fireworks into boxes, then labels and shrink-wraps them. This is not the sort of substantial change or transformation that places the fireworks "in a form, composition, or character different from that in which [they were] acquired." [45 IAC 2.2-5-8\(k\)](#). See also *Indianapolis Fruit*, 691 N.E.2d at 1386; *Mechanics Laundry & Supplies, Inc. v. Indiana Dep't of State Revenue*, 650 N.E.2d 1223, 1229 (Ind. Tax Ct. 1995) (holding that producing a good is not merely perpetuating already existing goods); *Harlan Sprague Dawley*, 605 N.E.2d at 1229; *Faris Mailing*, 512 N.E.2d at 483. Nor does North Central's process increase the number of "scarce economic goods," see *Harlan Sprague Dawley*, 605 N.E.2d at 1225, because the same number of fireworks are sold regardless of the way they are packaged. Consequently, North Central's activities do not constitute the direct production or manufacture of other tangible personal property.

Id. at 201-2.

Since Taxpayer is not the manufacturer of the goods and merely repackages goods produced by another, Taxpayer is not entitled to the manufacturing exemptions. Therefore, Taxpayer's protest to the denial of its claim for refund of sales and use tax on its purchases of "mail label bar coding equipment, supplies, and materials" is denied.

2. "COMBO and SIBO Form Invoices."

Taxpayer provides "COMBO and SIBO form invoices" ("form invoices") with the products it sells. The invoices provide information—i.e., the order information, back order handling instructions, warranty information, the care and handling of the product, information on refunds or exchanges, contact information, and a shipping label to facilitate product returns. Taxpayer maintains that since these form invoices go into every package for the merchandise it sells, these form invoices are exempt under the "manufacturing incorporation exemption" found at IC § 6-2.5-5-6. Alternatively, Taxpayer argues that the form invoices are only temporarily in Indiana and qualify for the "temporary storage exemption." Lastly, Taxpayer argues that the form invoices are partially used out-of-state and should qualify for a partial exemption because the merchandise is sent from its Indiana warehouse to a location outside of Indiana.

Taxpayer's first point of protest relates to Taxpayer's claim of entitlement to the "manufacturing incorporation exemption" found at IC § 6-2.5-5-6. As discussed above in subpart A, since Taxpayer is not the manufacturer of the goods and merely repackages goods produced by another, Taxpayer is not entitled to the manufacturing

exemptions. Additionally, the form invoices are not "incorporated" as a "material part" of the product as required by IC § 6-2.5-5-6 and [45 IAC 2.2-5-14](#). See *Miles, Inc. v. Indiana Dep't of State Revenue*, 659 N.E. 2d 1158, 1164 (Ind. Tax Ct. 1995) (explaining that while each chemical or ingredient in the Alka-Selzer is a "material part" of or essential to the product, the coupons that are inserted into the packaging are not a "material part" of or essential to the product because the coupons do not impact the product's effectiveness and have an undertaking that is vastly different from the products "task of alleviating physical maladies.")

Taxpayer's second point of protest is based upon the form invoices qualifying for the "temporary storage exemption." Presumably, Taxpayer is attempting to apply the "temporary storage exception" to its "use" of the form invoices. "Use" is defined at IC § 6-2.5-3-1(a) "as the exercise of any right or power of ownership over tangible personal property." However, IC § 6-2.5-3-1(b) provides a specific exception (the "temporary storage exception") to the imposition of Indiana use tax for property which is temporarily stored in Indiana but which is subsequently used solely outside of Indiana. Taxpayer maintains that its "temporary storage" of the form invoices in Indiana did not give rise to a taxable use because Taxpayer purchased the form invoices and temporarily retained them in Indiana for use outside of Indiana.

Even when Taxpayer's argument is accepted on its face, Taxpayer's argument fails to the extent that Taxpayer has claimed a refund of sales tax because there is no "temporary storage exception" for sales tax. For those transactions in which Taxpayer paid sales tax, Taxpayer purchased taxable items from Indiana vendors to which it correctly paid sales tax at the time of the original transaction. Moreover, for the transactions where Taxpayer remitted use tax, Taxpayer's use of the form invoices falls within the statutory definition of "use" found in IC § 6-2.5-3-1(a) and exceeds the "temporary storage exception" found in IC § 6-2.5-3-1(b). The Tax Court addressed the issues of "storage" and "use" in *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466 (Ind. Tax Ct. 1993), where the taxpayer bought food to be delivered in Indiana, loaded the food on its plane in Indiana, and served the food to its passengers when the plane was in another state. In this case the court explained:

In the present case, USAir receives the food from Dobbs House and pays for it in the ordinary course of business. Once USAir receives the food, it has full ownership control and it exercises its authority over the food by placing the food onto its planes in Indianapolis, as well as determining which meals and snacks go into which planes and whether they go into the cabin or the belly. Finally, USAir transports the food out of Indiana. These actions fall squarely within the statutory definition of "use": in deciding the disposition of the food, USAir "exercise[d]... [a] right or power of ownership... " over the food. [IC 6-2.5-3-1\(a\)](#). Nonetheless, USAir repeatedly reminds the court that the food is not eaten in Indiana. The location where the food is eaten, however, is not dispositive under the statute. "In effect, [USAir] would define the word use to mean the intended or the ultimate use of [the] property,... [but] [t]hat line of reasoning does not comport with the statutory definition of use.... " *Woman's Int'l Bowling Congress, Inc. v. Porterfield* (1971), 25 Ohio St.2d 271, 274, 267 N.E.2d 781, 783 (emphasis in original).FN6 Moreover, simply because the food is not immediately eaten does not mean it is stored within the meaning of [IC 6-2.5-3-1\(b\)](#). Instead, the food is transported until it reaches the location outside Indiana at which it is eaten. Transport is not storage. USAir simply holds the food in the planes' bellies and kitchens incident to transporting the food. USAir exercises ownership rights over the food in Indiana and is therefore subject to imposition of the use tax. FN7

Id. at 470-1.

Taxpayer receives the form invoices in Indiana. Once taxpayer receives the form invoices, it has full ownership and control of them. Taxpayer exercises its authority over the form invoices by determining with type of form invoice is needed, filing them out for each specific customer, placing them in the customers' packages, and sending them with the package to the customer. These "uses" of the form invoices are not "storage," are "the exercise of any right or power of ownership" in Indiana, and, thus, represent taxable "uses" of the form invoices in Indiana that are subject to Indiana use tax.

Taxpayer's last point of protest relates to Taxpayer's request that the form invoices qualify for a partial exemption for being used outside the state part of the time. However, Taxpayer failed to present any evidence that any use tax was paid to any other jurisdictions based upon this partial use in other states. See IC § 6-2.5-3-5 (providing for a credit not for the use in other jurisdictions, but for the amount of any sales tax, purchase tax, or use tax rightfully paid to other jurisdictions.) Since the form invoices were used in Indiana and no sales or use tax was remitted, the form invoices are subject to use tax in Indiana. Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer failed to produce documentation that demonstrates that the Department's assessment was incorrect, Taxpayer has failed to meet its burden to prove.

In conclusion, Taxpayer does not qualify for the manufacturing exemptions. Taxpayer's "use" of the form invoices does not qualify for the temporary storage exception. The Department respectfully declines Taxpayer's invitation to allow a partial exemption for use outside the state.

FINDING

Taxpayer's protest to the denial of its sales and use tax refund claim is respectfully denied.

II. Sales and Use Tax—Imposition.

DISCUSSION

The Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes "an excise tax, known as the use tax," on tangible personal property that is acquired in retail transactions and is stored, used, or consumed in Indiana. IC § 6-2.5-3-2(a). An exemption from the use tax is granted for transactions when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. Thus, "Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana gross retail tax has been collected at the point of purchase." [45 IAC 2.2-3-4](#). In determining whether tangible personal property is subject to use tax, IC § 6-2.5-3-7(a) provides that "[a] person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption."

The Department determined that Taxpayer had made several purchases without either paying sales tax at the time of purchase or remitting use tax to the Department, and assessed use tax on the purchases. Taxpayer maintains that certain of its purchases are not subject to use tax. Taxpayer asserts that use tax was incorrectly imposed on items for which Taxpayer paid sales tax or accrued use tax on certain items; on items that were shipped from non-Indiana locations to non-Indiana locations; on labor/services; on items that were included in the assessment twice; on items used in shipping; on computer technical services; on technical computer services; on computer software; on items that were purchased for resale; on intercompany payments; and on a state late filing fee.

The Department notes that in applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

A. Sales Tax Paid on Invoice/Use Tax Assessed.

Taxpayer maintains that use tax is being imposed on items for which it has previously paid sales tax and on items for which it has previously remitted use tax to the Department.

During the audit, Taxpayer was unable to provide some of the invoices for its purchases and other use tax accrual information. The auditor was, therefore, unable to verify that Taxpayer paid sales tax at the time of the sales transaction and assessed use tax on the purchases. During the protest, Taxpayer submitted a number of invoices to demonstrate that sales tax was paid on certain of the purchases. During the protest, Taxpayer also submitted documentation to demonstrate that use tax was remitted for one of the items.

Taxpayer's protest is sustained, to the extent that Taxpayer has provided an invoice demonstrating that sales tax was paid on the item(s) or that use tax was accrued on the item. However, Taxpayer's protest is denied, to the extent that it was unable to provide an invoice demonstrating that sales tax was paid on the item(s) or the documentation demonstrating that use tax was remitted on the item.

Accordingly, Taxpayer's protest to the imposition of use tax on "items where sales tax or use tax was paid" is denied in part and sustained in part subject to the findings of a supplemental audit. The audit division is requested to review the submitted invoices, to review the submitted use tax accrual documentation, and to make whatever adjustments it deems appropriate.

B. Products Shipped to Non-Indiana Locations.

Taxpayer asserts that use tax is being imposed on items that were never used in Indiana. Taxpayer maintains that the items were purchased from non-Indiana locations and were either shipped to or delivered and installed at non-Indiana locations.

During the audit, Taxpayer was unable to provide some of the invoices for its purchases. The auditor was, therefore, unable to verify that those sales purchases were neither purchased from an Indiana location nor delivered to Indiana. During the protest, Taxpayer submitted a number of vendor invoices to demonstrate that the purchases were purchased from non-Indiana locations and were either shipped to or delivered and installed at non-Indiana locations.

Taxpayer's protest is sustained, to the extent that Taxpayer has provided documentation that demonstrates the items were purchased from non-Indiana locations and were either shipped to or delivered and installed at non-Indiana locations. However, Taxpayer's protest is denied, to the extent that it was unable to provide documentation that demonstrates that the items were purchased from non-Indiana locations and were either shipped to or delivered and installed at non-Indiana locations.

Accordingly, Taxpayer's protest to the imposition of use tax on "products shipped to non-Indiana locations" is denied in part and sustained in part subject to the findings of a supplemental audit. The audit division is requested to review the submitted invoices and make whatever adjustments it deems appropriate.

C. Labor/Services.

Taxpayer maintains that certain of its purchases are entirely or partially exempt because the purchases contain charges for labor, which are charges for services that are not subject to use tax.

Nonetheless, even taking Taxpayer's assertions at face value, the mere fact that an amount paid in a

transaction might have a labor component is not determinative. Pursuant to IC § 6-2.5-4-1(e), the amount of the retail transaction that is subject to sales tax includes "the price of the property transferred" and "any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records." Further, [45 IAC 2.2-4-1\(b\)\(3\)](#) provides that the amount of the retail transaction that is subject to tax includes the amounts collected for "services performed or work done on behalf of the seller prior to transfer of such property at retail." Thus, when services are performed or work is done to tangible personal property before the tangible personal property is transferred to the purchaser, then the amount of the charges for the services or work done is also subject to sales tax.

Moreover, services that are performed as part of a retail "unitary transaction" are subject to sales and use tax. IC § 6-2.5-1-2(b). A retail "unitary transaction" is one in which items of personal property and services are furnished under a single order or agreement and for which a total combined charge or price is calculated. IC § 6-2.5-1-1(a). A unitary transaction includes all items of property and services for which a total combined selling price is computed irrespective of the fact that the cost of services, which would not otherwise be taxable, is included in the selling price. [45 IAC 2.2-1-1\(a\)](#).

During the audit, Taxpayer was unable to provide some of the invoices for its purchases. The auditor was, therefore, unable to verify that the purchases were not subject to Indiana use tax. During the protest, Taxpayer submitted a number of invoices to demonstrate the nature of the transactions.

Taxpayer's protest is sustained, to the extent that Taxpayer has provided an invoice demonstrating that the transaction represented exempt services that were neither unitary transactions nor part of a retail transaction where services were performed prior to transfer. However, Taxpayer's protest is denied, to the extent that Taxpayer was unable to provide documentation that demonstrates that the nature of the transaction and failed to meet its burden under IC § 6-8.1-5-1(c). Additionally, Taxpayer's protest is denied, to the extent that the documentation provided demonstrates a unitary transaction or demonstrates a retail transaction where services were performed prior to transfer.

Accordingly, Taxpayer's protest to the imposition of use tax on "labor/services" is denied in part and sustained in part subject to the findings of a supplemental audit. The audit division is requested to review the submitted invoices and make whatever adjustments it deems appropriate.

D. Lump Sum Contracts.

Taxpayer asserts that use tax is being imposed on items that were purchased in a "lump sum contract." However, based upon the documentation provided for the transactions in question, either no contract was provided or the nature of the transaction was not for improvements to realty.

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer failed to produce documentation that demonstrates that the Department's assessment was incorrect, Taxpayer has failed to meet its burden to proof. Therefore, Taxpayer's protest to the imposition of use tax on a "lump sum contracts" is respectfully denied.

E. Items Included Twice.

Taxpayer seeks adjustments for purchases that were recorded twice. Taxpayer maintains that some of the purchases were mistakenly recorded in the expense and the capital assets accounts, and, therefore, were assessed by the auditor twice. During the protest, Taxpayer submitted a number of invoices to demonstrate that sales tax was assessed twice on certain of the purchases.

Taxpayer's protest is sustained, to the extent that Taxpayer has provided documentation that demonstrates that sales tax was assessed twice for the same item. However, Taxpayer's protest is denied, to the extent that it was unable to provide documentation that demonstrates that sales tax was assessed twice for the same item. Accordingly, Taxpayer's protest to the imposition of use tax on "items included twice" is denied in part and sustained in part subject to the findings of a supplemental audit. The audit division is requested to review the submitted documentation and to make whatever adjustments it deems appropriate.

F. "Items Used in Shipping."

Taxpayer maintains that certain of its purchases—i.e., inflatable film, craft paper, "expedx bags," "cartons/shipping boxes," "hygiene liners"—are exempt because the items protect the product during shipping.

Presumptively, Taxpayer is claiming these items qualify for the "nonreturnable packages exemption" found in IC § 6-2.5-5-9(d). IC § 6-2.5-5-9(d) provides that "[s]ales of wrapping material and empty containers are exempt from the state gross retail tax if the person acquiring the material or containers acquires them for use as nonreturnable packages for selling the contents that he adds." In addition, [45 IAC 2.2-5-16](#), in its relevant parts, provides:

(a) The state gross retail tax shall not apply to sales of nonreturnable wrapping materials and empty containers to be used by the purchaser as enclosures or containers for selling contents to be added, and returnable containers containing contents sold in a sale constituting selling at retail and returnable containers sold empty for refilling.

(b) In general the gross proceeds from the sale of tangible personal property in a transaction of a retail merchant constituting selling at retail are taxable. This regulation [[45 IAC 2.2](#)] provided an exemption for

wrapping materials and containers.

(c) General rule. The receipt from a sale by a retail merchant of the following types of tangible personal property are exempt from state gross retail tax:

- (1) Nonreturnable containers and wrapping materials including steel strap and shipping pallets to be used by the purchaser as enclosures for selling tangible personal property.

...

(d) Application of general rule.

(1) Nonreturnable wrapping material and empty containers. To qualify for this exemption, nonreturnable wrapping materials and empty containers must be used by the purchaser in the following way:

- (A) The purchaser must add contents to the containers purchased; and
- (B) The purchaser must sell the contents added.

...

Accordingly, the exemption is provided for wrapping materials or containers that act to enclose or contain a product. While the "items used in shipping" may help to preserve the product during shipping, the "items used in shipping" are not the packaging that acts to enclose or contain the product. Therefore, the "items used in shipping" do not meet the exemption for nonreturnable wrapping materials or containers.

Therefore, Taxpayer's protest to the imposition of use tax on "items used in shipping" is respectfully denied.

G. "Computer Technical Services."

The Department found that Taxpayer had purchases from various software providers—i.e., "Experian," "Anyware," and "American Correction Association"—without paying sales tax at the time of the purchase or remitting use tax to the Department. Taxpayer asserts that it has not purchased tangible personal property but, instead, purchased technical services that are not subject to use tax. During the audit, Taxpayer was unable to provide some of the invoices or documentation for its purchase transactions. The auditor was, therefore, unable to verify that the transactions were not subject to Indiana use tax.

During the protest, Taxpayer submitted a number of invoices and documents to demonstrate the nature of the transaction. The audit division is requested to review the submitted documentation and make whatever adjustments it deems appropriate. Taxpayer's protest is sustained, to the extent that Taxpayer has provided documentation that demonstrates that the transactions were for technical services only and were not for software or other tangible personal property. However, Taxpayer's protest is denied, to the extent that it was unable to provide documentation demonstrating that the transactions were not for software or other tangible personal property.

Accordingly, Taxpayer's protest to the imposition of use tax on "computer technical services" is denied in part and sustained in part subject to the results of the supplemental audit.

H. Software: "Tornago."

Taxpayer maintains that the "Tornago" software should qualify for a partial exemption for being used outside the state part of the time. However, Taxpayer failed to present any evidence that any use tax was paid to any other jurisdictions based upon this partial use in other states. See IC § 6-2.5-3-5 (providing for a credit not for the use in other jurisdictions, but for the amount of any sales tax, purchase tax, or use tax rightfully paid to other jurisdictions.) Since the software is used in Indiana and no sales or use tax was remitted, the software is subject to use tax in Indiana. Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer failed to produce documentation that demonstrates that the Department's assessment was incorrect, Taxpayer has failed to meet its burden to proof.

Therefore, Taxpayer's protest to the imposition of use tax on its purchase of "Tornago" software is respectfully denied.

I. "Merchandise for Resale."

Taxpayer maintains that certain of its purchases qualify for the "resale exemption." IC § 6-2.5-5-8(b) provides for an exemption from sales tax for purchases of tangible personal property that are purchased to be resold in the Taxpayer's ordinary course of business. Additionally, [45 IAC 2.2-5-15](#) states:

- (a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.
- (b) General rule. Sales of tangible personal property for resale, rental or leasing are exempt from the tax if all of the following conditions are satisfied:

- (1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;
- (2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and
- (3) The property is resold, rented or leased in the same form in which it was purchased.

(c) Application of General rule.

- (1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. This exemption does not apply to purchasers who intend to

consume or use the property or add value to the property through the rendering of services or performance of work with respect to the property.

(2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.

(3) The property must be resold, rented or leased in the same form in which it was purchased.

During the protest, Taxpayer stated that it would provide additional information such as purchase orders or invoices for sale of the products for which it was claiming an exemption. However, Taxpayer did not provide any additional documentation that demonstrates that the items were purchased for resale.

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer failed to produce documentation that demonstrates that the Department's assessment was incorrect, Taxpayer has failed to meet its burden to proof. Therefore, Taxpayer's protest to the imposition of use tax on "merchandise for resale" is respectfully denied.

J. Intercompany Payment: "Legal Settlement Accrual."

Taxpayer protests the imposition of use tax on a "legal settlement accrual." During the audit, Taxpayer was unable to provide some of the invoices or documentation for its purchase transactions. The auditor was, therefore, unable to verify that the transactions were not subject to Indiana use tax.

Taxpayer maintains that use tax is being imposed on an intercompany payment amount (\$29,950.20, on p.99 of audit report) that Taxpayer made to account for a legal settlement accrual. During the protest, Taxpayer submitted additional documentation for this transaction that demonstrated that it was not subject to use tax.

Therefore, Taxpayer's protest to the imposition of use tax on "legal settlement accrual" is sustained.

K. Intercompany payment: "Management Services Contract."

Taxpayer protests the imposition of use tax on a "management services contract payment." During the audit, Taxpayer was unable to provide some of the invoices or documentation for its purchase transactions. The auditor was, therefore, unable to verify that the transactions were not subject to Indiana use tax.

Taxpayer maintains that use tax is being imposed on an intercompany payment amount (\$114,048.16, on p.136 of audit report). Taxpayer claims that this amount is for an intercompany payment made under a management services contract. However, Taxpayer did not provide documentation to support its assertion.

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect. Since Taxpayer failed to produce documentation that demonstrates that the Department's assessment was incorrect, Taxpayer has failed to meet its burden to proof.

Therefore, Taxpayer's protest to the imposition of use tax on a "management services contract payment" is respectfully denied.

L. "State Late Filing Fee."

Taxpayer protests the imposition of use tax on a "state late filing fee." During the audit, Taxpayer was unable to provide some of the invoices or documentation for its purchase transactions. The auditor was, therefore, unable to verify that the transactions were not subject to Indiana use tax.

Taxpayer maintains that use tax is being imposed on a \$25 state annual report late filing fee. During the protest, Taxpayer submitted an invoice for this transaction that demonstrated that it was for a state late filing fee and is not subject to use tax.

Therefore, Taxpayer's protest to the imposition of use tax on a "state late filing fee" is sustained, to the extent that use tax was assessed on this transaction.

FINDING

Taxpayer's protest to the imposition of use tax on "items where sales tax or use tax was paid" is denied in part and sustained in part subject to the results of a supplemental audit, as discussed in subpart A. Taxpayer's protest to the imposition of use tax on "products shipped to non-Indiana locations" is denied in part and sustained in part subject to the results of a supplemental audit, as discussed in subpart B. Taxpayer's protest to the imposition of use tax on "labor/services" is denied in part and sustained in part subject to the results of a supplemental audit, as discussed in subpart C. Taxpayer's protest to the imposition of use tax on "lump sum contracts" is respectfully denied, as discussed in subpart D. Taxpayer's protest to the imposition of use tax on "items included twice" is denied in part and sustained in part subject to the results of a supplemental audit as discussed in subpart E. Taxpayer's protest to the imposition of use tax on "items used in shipping" is respectfully denied, as discussed in subpart F. Taxpayer's protest to the imposition of use tax on "computer technical services" is denied in part and sustained in part subject to the results of the supplemental audit, as discussed in subpart G. Taxpayer's protest to the imposition of use tax on its purchase of "Tornago" software is respectfully denied, as discussed in subpart H. Taxpayer's protest to the imposition of use tax on "merchandise for resale" is respectfully denied as discussed in subpart I. Taxpayer's protest to the imposition of use tax on "legal settlement accrual" is sustained, as discussed in subpart J. Taxpayer's protest to the imposition of use tax on a "management services contract payment" is respectfully denied, as discussed in subpart K. Taxpayer's protest to the imposition of use tax on a "state late filing fee" is sustained, to the extent that use tax was assessed on this

transaction, as discussed in subpart L.

CONCLUSION

Taxpayer's protest to the denial of its sales and use tax refunds claimed for the 2000 to 2007 tax years is denied, as discussed in Issue I. Taxpayer's protest to the imposition of use tax is denied in part and sustained in part subject to the results of a supplemental audit, as discussed in Issue II subparts A, B, C, E, and G. Taxpayer's protest to the imposition of use tax is sustained, as discussed in subparts J, L. Finally, the remainder of Taxpayer's protest to the imposition of use tax is denied, as discussed in Issue II subparts D, H, I, F, and K.

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